

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PERCY LEVY,) CASE NO. C06-1224-JLR-MAT
Petitioner,)
v.) REPORT AND RECOMMENDATION
JEFFREY UTTECHT,)
Respondent.)

)

INTRODUCTION AND SUMMARY CONCLUSION

13 Petitioner Percy Levy is a state prisoner who is currently incarcerated at the Washington
14 State Penitentiary in Walla Walla, Washington. He seeks relief under 28 U.S.C. § 2254 from his
15 2003 Snohomish County Superior Court convictions. Respondent has filed an answer to the
16 petition together with relevant portions of the state court record. Petitioner has filed a traverse
17 to respondent's answer. The briefing is now complete and this matter is ripe for review.
18 Following careful consideration of the record, this Court concludes that petitioner's § 2254
19 petition should be denied and that petitioner's petition, and this action, should be dismissed with
20 prejudice.

FACTUAL AND PROCEDURAL HISTORY

The Washington Court of Appeals, on direct appeal of petitioner's conviction, summarized

01 the facts of petitioner's crime as follows:

02 On October 24, 2002, a home invasion robbery took place in an apartment
 03 described as a "drug house." Present in the apartment were its renter, Kenya White,
 04 as well as Jerry Mitchell, Mike Montemayor, and Brianna Thorne. Levy arrived at the
 05 apartment in a Chevy Suburban driven by John Cox. The two men were accompanied
 06 by Denice Bowers and Breena Martin.

07 Martin entered the apartment first. Bowers joined her in the apartment after
 08 a few minutes. According to Bowers, when she went into the apartment, Martin took
 09 her into the bathroom, handed her a gun, and told her to take it out to the truck.
 10 Bowers went back to the truck, tossed the gun to Levy, and asked him to come with
 11 her inside the apartment. White allowed Bowers back in, but tried to keep Levy out.

12 Levy forced his way into the apartment. According to White and Mitchell,
 13 Levy had a gun in his hand at this time and according to Mitchell, the gun was
 14 cocked. Levy brought White, Mitchell, and Thorne into the bedroom, which was
 15 occupied by Montemayor.¹ Levy asked them to give him their money, drugs, and
 16 jewelry. When Thorne refused to give up her jewelry, Levy struck her in the face.
 17 Thorne then gave up her jewelry, cash, and cell phone. According to Montemayor,
 18 Levy picked up a crowbar and threatened him with it, still holding the gun in his other
 19 hand. Montemayor lifted up the mattress to protect himself, revealing \$650 hidden
 20 underneath.² Levy took the money, along with other cash, jewelry, and cell phones.
 21 Monetemayor saw Levy, Bowers, and Martin drive away in the Suburban.

22 At some point, White called 911. Later that morning, Levy was arrested near
 a Suburban matching the description provided by Montemayor. Officers found a
 loaded .38 handgun and a tire iron inside the Suburban. They found cash and jewelry
 on Levy. The State charged Percy Levy with unlawful possession of a firearm in the
 second degree, first degree burglary with a deadly weapon allegation, and three
 counts of first degree robbery with deadly weapon allegations.

20 ¹ This Court's reading of the transcript indicates that White was not, in fact, brought into
 21 the bedroom, but that she instead remained in the living room with Bowers.

22 ² The testimony at trial was that there was \$560 hidden under the mattress, not \$650. (See
 Dkt. No. 18, Ex. 37, Vol. 2 at 113.)

01 Bowers testified against Levy at trial in exchange for her charges being
 02 reduced to a misdemeanor. White, Montemayor, Thorne, and Mitchell also testified
 03 for the State. The defense had wanted to call Martin as a witness, but her attorney
 04 represented to the court that she would assert her Fifth Amendment right not to
 05 testify. Cox, the driver of the Suburban, did not testify, nor did Levy testify on his
 06 own behalf. The defense argued that the State's witnesses were all drug addicts who
 07 could not be believed, and pointed to various inconsistencies in the witnesses'
 08 testimony.

09 Neither party took exception to any of the court's instructions to the jury.
 10 Instruction number 10 provided:

11 To convict the defendant of the crime of burglary in the first degree,
 12 as charged in Count I, each of the following elements of the crime must be
 13 proved beyond a reasonable doubt:

14 (1) That on or about the 24th day of October, 2002, the defendant,
 15 or an accomplice, entered or remained unlawfully in a building: to-wit: the
 16 building of Kenya White, located at 711 W. Casino Rd., Everett, WA;

17 (2) That the entering or remaining was with intent to commit a
 18 crime against a person or property therein;

19 (3) That in so entering or while in the dwelling or in immediate
 20 flight from the dwelling the defendant or an accomplice in the crime charged
 21 was armed with a deadly weapon, to-wit: a .38 revolver or a crowbar; and

22 (4) That the act occurred in the State of Washington.

23 If you find from the evidence that each of these elements has been
 24 proved beyond a reasonable doubt, then it will be your duty to return a verdict
 25 of guilty.

26 On the other hand, if, after weighing all of the evidence you have a
 27 reasonable doubt as to any one of these elements, then it will be your duty to
 28 return a verdict of not guilty.

29 (Emphasis added). Instruction 15 provided:

30 To convict the defendant of the crime of robbery in the first degree,
 31 as charged in Count II, each of the following elements of the crime must be
 32 proved beyond a reasonable doubt:

(1) That on or about the 24th day of October, 2002, the defendant, or an accomplice, unlawfully took personal property to wit: jewelry, from the person or in the presence of another, to-wit: Michael Montemayor;

(2) That the defendant intended to commit theft of the property;

(3) That the taking was against Michael Montemayor's will by the defendant's, or an accomplice's, use or threatened use of immediate force, violence or fear of injury to Michael Montemayor;

(4) That the force or fear was used by the defendant, or an accomplice, to obtain or retain possession of the property;

(5) That in the commission of these acts the defendant or an accomplice was armed with a deadly weapon, to wit: a .38 revolver or a crowbar; and

(6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(Emphasis added). Instructions 16 and 17 were identical to Instruction 15, except they referred to Counts III and IV, and instead of “Michael Montemayor,” they named as alleged victims “Brianna Thorne aka April Ames” and “Kenya White” respectively. Instruction 20 provided:

In regard to Counts I, II, III, and IV, it is alleged that the defendant, or an accomplice, possessed one or more deadly weapons, to wit: a .38 revolver or a crowbar. To convict the defendant in Counts I, II, III, and IV, the State must prove beyond a reasonable doubt that the defendant possessed one or more deadly weapons. Further, you must unanimously agree as to which deadly weapon or deadly weapons, (a .38 revolver or a crowbar), he possessed.

The jury was separately, properly instructed on the definitions of building, deadly weapon, and firearm.

01 The jury found Levy not guilty on Count IV, relating to the alleged robbery
 02 of Kenya White, but guilty on the remaining counts. By way of special verdict forms
 03 on the robberies and the burglary, the jury found that Levy was armed with a deadly
 04 weapon at the time of the offenses. On each count in question, the jury found that
 05 Levy was not armed with a crowbar, but was armed with a firearm.

06 (Dkt. No. 18, Ex. 6 at 2-5.)

07 On February 26, 2003, petitioner was sentenced to a total term of confinement of 231
 08 months. (*Id.*, Ex. 1 at 6.) On March 3, 2003, petitioner's judgment and sentence was amended.
 09 (*See id.*, Ex. 31 at Ex. 3.) This amendment appears to have resulted in an increase in petitioner's
 10 total term of confinement to 330 months. (*Id.*)

11 On March 22, 2003, petitioner's counsel filed a timely notice of appeal of the judgment
 12 and sentence entered by the Snohomish County Superior Court. (*Id.*, Ex. 2.) On October 31,
 13 2003, petitioner's appellate counsel filed a brief of appellant in the Washington Court of Appeals
 14 which presented the following issue for review:

15 The Washington Constitution forbids judicial comments on the evidence. A
 16 trial judge violated this prohibition when he or she instructs the jury that matters of
 17 fact have been established as a matter of law. In appellant's case, the trial court
 18 instructed the jury that a number of facts critical to the State's proof had been
 19 established as a matter of law. In effect, the court directed the jury to find essential
 20 elements of the offenses. Is appellant entitled to a new trial on these charges?

21 (*Id.*, Ex. 3 at 1.)

22 On December 31, 2003, petitioner filed a *pro se* brief of appellant in which he identified
 23 the following additional assignments of error:

- 24 A. Levy's right to confrontation was violated and gun was wrongly admitted at
 25 the suppression hearing.
- 26 B. Attorney was ineffective at suppression hearing.

- 01 C. Levy's right to confrontation was violated by witness Martin not taking the
stand.
- 02 D. Levy's lawyer was ineffective concerning the calling of witness Martin.
- 03 E. Levy's lawyer was ineffective for not admitting exculpatory evidence.
- 04 F. Sequestration order was violated by witnesses and no inquiry held.
- 05 G. Opinion evidence was admitted by testifying officer in the form of expert
testimony by a lay witness.
- 06 H. Levy was denied a fair trial by the fact he wore jail I.D in the presence of the
jury.
- 07 I. No hearing or inquiry was held to levy's challenge on the record that his
speedy trial right was violated.
- 08 J. Lawyer was not allowed to withdraw.
- 09 K. Lawyer was ineffective at arguing Levy's offender score.
- 10 L. Insufficient evidence to convict.
- 11 M. Failure to inquire into conflict of interest (sic) about attorney.
- 12 N. Trial council (sic) was ineffective in his examination of witnesses.

15 (Dkt. No. 18, Ex. 4 at 1-2.)

16 On June 14, 2004, the Court of Appeals issued an opinion in which it affirmed petitioner's
17 convictions. (*Id.*, Ex. 6.) On June 24, 2004, petitioner filed a *pro se* motion for reconsideration.
18 (*Id.*, Ex. 7.) Petitioner's motion was denied on July 19, 2004. (*Id.*, Ex. 8.)

19 On August 15, 2004, petitioner filed a document, *pro se*, in which he sought review of the
20 Court of Appeals' decision affirming his convictions. (*Id.*, Ex. 9.) It appears that this document
21 was construed as a petition for review. Petitioner presented the following issues to the
22 Washington Supreme Court for review in his August 15, 2004, document:

- 01 A. Did Court of appeals error in reviewing Levy's case without sufficient
transcripts (sic).
- 02 B. Can A comment on the evidence by the court that releives (sic) the jury of it's
duty be considered harmless error? Is the error harmless?
- 03 C. Did Levy's right to compel witnesses get violated by the witnesses (sic)
attorney blanketly (sic) asserting the priveledge (sic)?
- 04 D. Was hearsay evidence of a consent to search enough to admit a weapon
without the consent sighner (sic) being present?

05
06
07 (Dkt. No. 18, Ex. 9 at 1.)

08 The Supreme Court granted review on all four issues (*see id.*, Ex. 12 at 6) and counsel was
09 apparently appointed to represent petitioner (*see id.*, Ex. 11). On April 13, 2006, the Washington
10 Supreme Court issued an en banc decision in which it affirmed the Washington Court of Appeals'
11 decision with respect to the judicial comment issue (Issue B) and with respect to petitioner's Sixth
12 Amendment claim (Issue C). (*Id.*, Ex. 12 at 29.) In addition, the Supreme Court found each of
13 petitioner's specific *pro se* claims to be without merit (Issue A), and concluded that petitioner's
14 claim pertaining to the admission of evidence at the suppression hearing was not challengeable on
15 appeal (Issue D). On July 7, 2006, the Supreme Court issued its mandate terminating direct
16 review. (*Id.*, Ex. 13.)

17 While petitioner's direct appeal was pending, petitioner filed three separate personal
18 restraint petitions in the state courts. (*See id.*, Exs. 14, 24, and 30.) Each of those petitions was
19 stayed pending resolution of petitioner's direct appeal, and each was ultimately dismissed. (*See*
20 *id.*, Exs. 18, 19, 21, 27, 28, 32, and 34.) Petitioner now seeks federal habeas review of his
21 convictions.

22 / / /

GROUND FOR RELIEF

Petitioner identifies seven grounds for relief in his federal habeas petition:

GROUND ONE: Washington Supreme Court erred in analyzing a structural error for harmlessness.

GROUND TWO: Levy's constitutional right to a jury trial and due process was violated by instructions at trial.

GROUND THREE: Levy was denied his constitutional right to present a defense (by way of State's misconduct).

GROUND FOUR: It was a violation of Levy's constitutional right to effective counsel for attorney to not know applicable law.

GROUND FIVE: It was a violation of constitutional right to effective counsel for attorney to terminate a reasonable defensive strategy.

GROUND SIX: Levy's constitutional right to confrontation was violated by not being able to confront witness.

GROUND SEVEN: Constitutional violation to deny Levy's right to appeal (due process) (equal protection).

(See Dkt. No. 6 at 5, 6, 8, 9, 11a, 11c, and 11e.)

DISCUSSION

Respondent concedes in his answer to petitioner's federal habeas petition that petitioner has properly exhausted his first, second, third, and seventh grounds for relief. Respondent argues, however, that the decisions by the Washington State Courts with respect to those claims were not contrary to or an unreasonable application of clearly established federal law and that petitioner is therefore not entitled to relief with respect to those claims. As to petitioner's remaining claims, respondent asserts that petitioner has not exhausted his fourth, fifth, and sixth grounds for relief and argues that he would now be barred from returning to the state courts to properly exhaust

those claims.

Exhaustion

A state prisoner is required to exhaust all available state court remedies before seeking a federal writ of habeas corpus. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is a matter of comity, intended to afford the state courts “an initial opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” *Picard v. Connor*, 404 U.S. 270, 275 (1971)(internal quotation marks and citations omitted). In order to provide the state courts with the requisite “opportunity” to consider his federal claims, a prisoner must “fairly present” his claims to each appropriate state court for review, including a state supreme court with powers of discretionary review. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (citing, *Duncan v. Henry*, 513 U.S. 364, 365 (1995), and *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

It is not enough that all the facts necessary to support a prisoner's federal claim were before the state courts or that a somewhat similar state law claim was made. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d at 830. In addition, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

1. Grounds Four and Five

Petitioner asserts in his fourth ground for federal habeas relief that he was denied his right to effective assistance of counsel when his trial counsel failed to secure the physical presence of Breena Martin at trial. Martin was a co-defendant of petitioner's, who was to be tried separately,

01 and who asserted her Fifth Amendment right at petitioner's trial through her attorney. Petitioner
02 indicates that his attorney originally sought to have Martin take the stand so that the defense could
03 investigate whether Martin had been threatened into not testifying. He asserts, however, that his
04 attorney gave up on his efforts to have Martin take the stand because he failed to research the
05 applicable law.

06 Petitioner asserts in his fifth ground for federal habeas relief that his attorney failed to
07 pursue a reasonable defense strategy involving ownership of jewelry taken during the robbery.
08 Petitioner faults counsel for failing to call a booking officer who booked petitioner into the
09 Snohomish County Jail a few days prior to the date of the instant offense who could have testified
10 about jewelry which was in petitioner's possession at the time of that booking. Petitioner also
11 faults counsel for failing to try to admit the booking receipt from that prior booking which reflects
12 that petitioner had jewelry in his possession at that time.

13 Respondent asserts that petitioner failed to present his fourth and fifth habeas claims to the
14 Washington Supreme Court for review. The record supports this assertion. In his *pro se* brief of
15 appellant, which was presented to the Court of Appeals on direct appeal, petitioner argued that
16 his trial counsel was ineffective in a number of different respects. Two of the ineffective assistance
17 of counsel claims presented to the Court of Appeals were similar in nature to the ones presented
18 in petitioner's fourth and fifth grounds for federal habeas relief. However, petitioner presented
19 no such claims in his petition for review to the Washington Supreme Court.

20 In his petition for review, petitioner referenced two ineffective assistance of counsel claims
21 which he had presented to the Washington Court of Appeals in his *pro se* brief, and which he
22 claimed the Court of Appeals had not adequately analyzed because of an incomplete record. (See

01 Dkt. No. 18, Ex. 9 at 4.) However, neither of those ineffective assistance of counsel claims was
02 based on the same facts as those which serve as the basis for petitioner's fourth and fifth grounds
03 for federal habeas relief.

04 Petitioner also appeared to indicate in his petition for review that he was dissatisfied with
05 his appellate counsel because counsel failed to ensure that the Court of Appeals had a complete
06 record on which to base its decision. (*Id.*, Ex. 9 at 17.) However, petitioner's fourth and fifth
07 grounds for relief clearly implicate the effectiveness of trial counsel, not appellate counsel. As
08 nothing in the record before this Court reflects that petitioner ever presented either his fourth or
09 fifth ground for federal habeas relief to the Washington Supreme Court for review, this Court must
10 conclude that neither of those claims has been properly exhausted. *See O'Sullivan v. Boerckel*,
11 526 U.S. 838 (1999).

12 2. Ground 6

13 Petitioner asserts in his sixth ground for federal habeas relief that he was denied his
14 constitutional right to confront witnesses when a consent to search form was admitted at a pre-
15 trial suppression hearing despite a challenge to the identity of the individual who signed the
16 consent form. Petitioner argues that this constituted a violation of the rule announced in *Crawford*
17 *v. Washington*, 541 U.S. 36 (2004). Respondent asserts that this claim has not been properly
18 exhausted because petitioner, in his petition for review on direct appeal, argued to the Washington
19 Supreme Court only that his due process rights were violated when the trial court allowed into
20 evidence a weapon which was found in the vehicle of a non-testifying witness. Respondent notes
21 that petitioner never specifically asserted a federal constitutional violation when he presented this
22 claim to the Washington Supreme Court nor did he cite to any federal case law in support of his

01 claim.

02 While respondent is correct that petitioner did not present his sixth claim for relief to the
03 Washington Supreme Court on direct appeal, it appears that petitioner did present a similar claim
04 to the Washington Supreme Court during proceedings related to his third personal restraint
05 petition. While petitioner did not specifically assert a Confrontation Clause claim in his third
06 personal restraint petition, it appears that he did present such a claim to the court at some point
07 because the state specifically addressed petitioner's *Crawford* claim in its response to petitioner's
08 third personal restraint petition (see Dkt. No. 18, Ex. 31 at 17-19), and the Supreme Court
09 Commissioner referenced and rejected petitioner's *Crawford* argument in his ruling dismissing
10 petitioner's third personal restraint petition (see *id.*, Ex. 34 at 2.)

11 Because it appears that petitioner did, in fact, present to the Washington Supreme Court
12 for review a Confrontation Clause issue similar to the one presented in his sixth ground for federal
13 habeas relief, this Court must conclude that the claim has been exhausted. This Court will
14 therefore consider the merits of petitioner's sixth ground for relief below.

15 Procedural Default

16 When a petitioner fails to exhaust his state court remedies and the court to which petitioner
17 would be required to present his claims in order to satisfy the exhaustion requirement would now
18 find the claims to be procedurally barred, there is a procedural default for purposes of federal
19 habeas review. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991).

20 Respondent argues that petitioner would now be procedurally barred under Washington
21 law from presenting his unexhausted claims to the state courts by operation of RCW 10.73.140
22 which bars the filing of successive personal restraint petitions. Petitioner appears to suggest in his

01 traverse to respondent's answer that he would not necessarily be procedurally barred from
02 returning to the state courts because the language of RCW 10.73.140 is not mandatory.

03 RCW 10.73.140 provides in relevant part as follows:

04 Upon receipt of a personal restraint petition, the court of appeals shall review the
05 petition and determine whether the person has previously filed a petition or petitions
06 and if so, compare them. If upon review, the court of appeals finds that the petition
07 has previously raised the same grounds for review, or that the petitioner has failed to
08 show good cause why the ground was not raised earlier, the court of appeals shall
09 dismiss the petition on its own motion without requiring the state to respond to the
10 petition.

11 The two grounds which this Court concludes have not been properly exhausted were
12 presented to the Court of Appeals in petitioner's *pro se* brief on appeal and those claims were
13 rejected. Petitioner simply failed to pursue these claims at the next level of review. Were
14 petitioner to return to state courts to attempt to exhaust these claims, he would have to establish
15 good cause for his failure to raise the claims in one of his *three* prior personal restraint petitions.
16 As petitioner's unexhausted claims were clearly available to him at the time his previous personal
17 restraint petitions were filed, it seems highly unlikely that he would be able to make the showing
18 required by RCW 10.73.140.

19 The Court notes that there is an additional reason why petitioner would be unlikely to
20 obtain review if he were to return to the state courts in an attempt to exhaust his fourth and fifth
21 grounds for relief. Under Washington law, "a personal restraint petitioner may not renew an issue
22 that was raised and rejected on direct appeal unless the interests of justice require relitigation of
that issue." *In re Lord*, 123 Wn.2d 296, 303 (1994) (citing *In re Taylor*, 105 Wn.2d 683, 688
(1986)). As petitioner's fourth and fifth grounds for relief were originally presented to the Court
of Appeals on direct appeal, it appears unlikely that petitioner would be permitted to litigate those

01 claims a second time.

02 For the foregoing reasons, it appears likely that the state courts would find petitioner's
 03 fourth and fifth grounds for federal habeas relief procedurally barred. Accordingly, this Court
 04 concludes that petitioner has procedurally defaulted on his fourth and fifth grounds for federal
 05 habeas relief.

06 Cause and Prejudice

07 When a state prisoner defaults on his federal claims in state court, pursuant to an
 08 independent and adequate state procedural rule, federal habeas review of the claims is barred
 09 unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the
 10 alleged violation of federal law, or demonstrate that failure to consider the claims will result in a
 11 fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750.

12 To satisfy the "cause" prong of the cause and prejudice standard, petitioner must show that
 13 some objective factor external to the defense prevented him from complying with the state's
 14 procedural rule. *Id.* at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To show
 15 "prejudice," the petitioner "must shoulder the burden of showing, not merely that the errors at his
 16 trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial
 17 disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v.*
 18 *Frady*, 456 U.S. 152, 170 (1982) (emphasis in original). Only in an "extraordinary case" may the
 19 habeas court grant the writ without a showing of cause or prejudice to correct a "fundamental
 20 miscarriage of justice" where a constitutional violation has resulted in the conviction of a
 21 defendant who is actually innocent. *Murray v. Carrier*, 477 U.S. at 495-96.

22 Petitioner asserts in his traverse that his argument concerning missing transcripts which

01 was presented to the Washington Supreme Court in his petition for review on direct appeal
02 incorporated his fourth and fifth grounds for relief. He also asserts that the cause of his failure to
03 exhaust those claims is a result of the missing transcripts. The record reflects that petitioner
04 argued to the Washington Supreme Court that certain claims had not been considered by the Court
05 of Appeals as a result of missing transcripts. However, petitioner's fourth and fifth grounds for
06 relief were not among those claims. Petitioner makes no showing that the missing transcripts were
07 the cause of his failure to exhaust his fourth and fifth grounds for relief. Accordingly, this Court
08 concludes that petitioner has not established cause for his failure to exhaust his state court
09 remedies with respect to these two grounds for relief.

10 Because petitioner has not met his burden of demonstrating cause for his procedural
11 default, this Court need not determine whether petitioner carried his burden of showing actual
12 prejudice. *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1448 (9th Cir. 1989) (citing *Smith v. Murray*,
13 477 U.S. 527, 533 (1986)). In addition, petitioner makes no colorable showing of actual
14 innocence. Petitioner therefore fails to demonstrate that his fourth and fifth grounds for federal
15 habeas relief are eligible for federal habeas review. Petitioner's federal habeas petition should
16 therefore be dismissed as to these two grounds for relief.

17 Standard of Review for Exhausted Claims

18 Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may
19 be granted with respect to any claim adjudicated on the merits in state court only if the state
20 court's decision was *contrary to*, or involved an *unreasonable application* of, clearly established
21 federal law, as determined by the Supreme Court, or if the decision was based on an unreasonable
22 determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis

01 added).

02 Under the “contrary to” clause, a federal habeas court may grant the writ only if the state
03 court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law,
04 or if the state court decides a case differently than the Supreme Court has on a set of materially
05 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the “unreasonable
06 application” clause, a federal habeas court may grant the writ only if the state court identifies the
07 correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that
08 principle to the facts of the prisoner’s case. *Id.* The Supreme Court has made clear that a state
09 court’s decision may be overturned only if the application is “objectively unreasonable.” *Lockyer*
10 *v. Andrade*, 538 U.S. 63, 69 (2003).

11 Grounds One and Two: Erroneous Jury Instructions

12 Petitioner’s first two grounds for relief arise out of the jury instructions given at
13 petitioner’s trial. Petitioner asserts in his first ground for relief that the Washington Supreme
14 Court erred when, after concluding that certain instructions were erroneous, it analyzed those
15 errors under the harmless error standard. Petitioner contends that the errors were structural and
16 therefore subject to automatic reversal. Petitioner asserts in his second ground for relief that his
17 constitutional rights to a jury trial and to due process were violated by the jury instructions which
18 the state courts concluded were not erroneous.

19 Petitioner presented a single jury instruction claim to the Washington Court of Appeals on
20 direct appeal. That claim was that instructions 10, 15, 16 and 20 contained impermissible judicial
21 comments on the evidence in violation of article 4, § 16 of the Washington Constitution.
22 (Dkt. No. 18, Ex. 3 at 1.) The Court of Appeals, in analyzing this claim, concluded that some of

01 the challenged instructions amounted to improper comments on the evidence and others did not.
02 (See *id.*, Ex. 6 at 9-10.) As to those instructions which the Court of Appeals concluded were
03 erroneous, the court conducted a harmless error analysis and concluded that the instructional
04 errors were harmless beyond a reasonable doubt. (See *id.*, Ex. 6 at 10-14.)

05 In his *pro se* petition for review to the Washington Supreme Court, petitioner argued that
06 the judicial comments contained within certain of the jury instructions effectively instructed the
07 jury that elements of the charged crimes had been established as a matter of law and thereby
08 removed those elements from the jury's consideration. (See *id.*, Ex. 9 at 5-15.) Petitioner
09 asserted that the Supreme Court should accept review of this issue because the decision of the
10 Court of Appeals was in conflict with a decision of the Washington Supreme Court, *State v.*
11 *Becker*, 132 Wn.2d 54 (1997), and because petitioner had presented a significant question under
12 the United States Constitution. (Dkt. No. 18, Ex. 9 at 5.) As to the federal constitutional
13 question presented, petitioner argued that the erroneous jury instructions violated constitutional
14 principles because they removed elements of the offenses from the jury's consideration, and that
15 such instructions required automatic reversal. (See *id.*, Ex. 9 at 6-10.)

16 Petitioner's counsel subsequently filed a supplemental brief in which he argued that the trial
17 court's instructions to the jury were an impermissible comment on the evidence in violation of
18 Article IV, Section 16 of the Washington State Constitution. (See *id.*, Ex. 11 at 7-17.) Counsel
19 further argued that the instructional errors were structural and therefore, under *Neder v. United*
20 *States*, 527 U.S. 1 (1999), were not subject to harmless error analysis. (*Id.* at 17-20.)

21 The Washington Supreme Court issued an *en banc* decision in which it considered and
22 rejected the merits of petitioner's challenge to the jury instructions. The Court explained its

reasoning as follows:

A. Is a reference in a jury instruction to a fact that must be proved by the State a judicial comment on the evidence? If so, what is the effect?

Levy argues that five jury instructions included judicial comments on the evidence that removed several elements from the jury's consideration at trial and must be considered structural errors that are not subject to harmless error analysis. Alternatively, he argues that even if the errors were not structural, and prejudicial per se, they cannot survive harmless error analysis. The State makes two primary arguments in response. First, it contends that Levy has not shown that the instructions were manifest errors affecting a constitutional right and, because he failed to object to the instructions at trial, he may not raise the issue for the first time on appeal. Alternatively, the State argues that the elements at issue in the instructions were not in dispute at trial, and, thus, any reference to them was harmless.

1. *Has Levy established a manifest constitutional error?*

Levy did not assert that the error was a manifest constitutional error in his petition for review. However, in his brief on the merits, he argued that this court has historically accepted review of challenges to instructions on the grounds that they are judicial comments. The State argues that because Levy did not object to the instruction at trial, in order to establish that the error is manifest he must show that the error affected his rights and an error that is “purely abstract and theoretical” cannot be raised for the first time on appeal. Br. of Resp’t at 10. The State further argues that errors in jury instructions are only of constitutional magnitude if they are misleading or fail to inform the jury of the applicable law.

We have long held that even if the defendant fails to object at trial, error may be raised on appeal if it “invades a fundamental right of the accused.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (a reviewing court will “consider a claimed error in an instruction if giving such instruction invades a fundamental right of the accused.”); *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968) (because a comment on the evidence invades a constitutional provision, failure to object does not foreclose raising the issue on appeal); *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (even if the evidence is undisputed or overwhelming, comment by the judge violates a constitutional injunction).

The claimed error in the jury instructions here alleges judicial comment on the evidence, not the omission of elements. Because judicial comments on the evidence are explicitly prohibited by the Washington Constitution we conclude that Levy raises an issue involving a manifest constitutional error, and his claim may be heard on appeal even though he did not object to the instructions at trial.

01 2. *Were the references judicial comments on the evidence?*

02 Levy argues that references to the building address, Kenya White, Michael
 03 Montemayor, Brianna Thorne, the revolver, the crowbar, and the jewelry “instruct[ed]
 04 the jury that matters have been established as a matter of law.” Pet. for Review at 5.
 05 Levy further argues that it is not necessary for the judge to expressly convey his
 06 personal feelings on the evidence for the comments to constitute a violation. *Id.* He
 07 cites to two rulings of this court as support for his claim that the “to wit” language
 08 violated the prohibition on judicial comments. *Becker*, 132 Wn.2d 54, 935 P.2d 1321;
 09 *State v. Akers*, 136 Wn.2d 641, 965 P.2d 1078 (1998). In *Becker*, we held that a
 10 special verdict form asking whether defendants were within 1,000 feet of school
 11 grounds that included the phrase ““to-wit: Youth Employment Education Program
 12 [YPE] School”” impermissibly relieved the state of its burden to prove that the
 13 program was, in fact, a school. 132 Wn.2d at 64. In *Akers*, we did not reach the
 14 question of whether a special verdict form that left out the word “school” in the “to-
 15 wit” phrase was judicial comment, but we criticized the Court of Appeals holding that
 16 it was not a judicial comment based on *Becker*, 136 Wn.2d at 644.

10 The State counters that jury instructions must be read as a whole and that the
 11 instructions in this case were clearly distinguishable from *Becker*. The State argues
 12 that in *Becker* the question of whether YEP was a school was critical to the issue of
 13 whether the defendants had committed a crime at all. 132 Wn.2d at 63. Here, the
 14 State contends that because other jury instructions defined the terms “building,”
 15 “deadly weapon,” and “personal property,” to interpret the “to-wit” references as a
 16 directed verdict would render the other instructions meaningless. Further, the State
 17 argues that there was never any dispute that White’s apartment is a building, that .38
 18 revolvers or crowbars are deadly weapons, that jewelry is personal property, or that
 19 named victims are persons other than the defendant.

15 We review jury instructions *de novo*, within the context of the jury
 16 instructions as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).
 17 A judge is prohibited by article IV, section 16 from “conveying to the jury his or her
 18 personal attitudes toward the merits of the case” or instructing a jury that “matters of
 19 fact have been established as a matter of law.” *Becker*, 132 Wn.2d at 64. Moreover,
 20 the court’s personal feelings on an element of the offense need not be expressly
 21 conveyed to the jury; it is sufficient if they are merely implied. *State v. Jacobsen*, 78
 22 Wn.2d 491, 495, 477 P.2d 1 (1970); *Lampshire*, 74 Wn.2d at 892. Thus, any remark
 23 that has the potential effect of suggesting that the jury need not consider an element
 24 of an offense could qualify as a judicial comment.

21 In *Becker*, the “to-wit” reference in the special verdict form expressly stated
 22 that the youth program *was a school*, a fact that was highly contested by the parties
 23 and critical to the case. 132 Wn.2d at 64. The question of whether it was a school

01 was also a threshold issue that had to be established for there to be *any crime at all*.
 02 *Id.* Here, the Court of Appeals concluded that the references to White's apartment
 03 as a building and to the revolver and crowbar as deadly weapons were arguably
 04 judicial comments. We agree with respect to the references to the building and
 05 crowbar.

06 The only instruction here that is clearly analogous to the instruction in *Becker*
 07 is the reference to "the building of Kenya White, located at 711 W. Casino Rd.,
 08 Everett, WA." CP at 59. As with the reference in *Becker*, which named YEP as a
 09 school," the instruction here expressly named White's apartment as "a building." *Id.*
 10 We therefore agree with the Court of Appeals that the use of the word "building" in
 11 the instruction improperly suggested to the jury that the apartment was a building as
 12 a matter of law.

13 The reference to the crowbar is also problematic. A crowbar only qualifies as
 14 a deadly weapon if it "has the capacity to inflict death and from the manner in which
 15 it is used, is likely to produce or may easily and readily produce death." RCW
 16 9.94A.602. Thus, the State must prove that the crowbar was used in a way that met
 17 the criteria of a deadly weapon. We conclude that the Court of Appeals correctly
 18 found that the reference to the crowbar as a deadly weapon was likely a judicial
 19 comment because the jury need not consider whether the State proved that its use
 20 caused it to be qualified as a deadly weapon.

21 We disagree with the Court of Appeals conclusion that the references to the
 22 revolver constituted judicial comment on the evidence. The pattern jury instructions
 23 permit a court to instruct the jury that a revolver is a deadly weapon as a matter of
 24 law, and the court was well within its authority to so instruct the jury in this case. *See*
 25 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 2.06.01, at
 26 29 (1994) (WPIC); WPIC 2.07.02, at 37.

27 We agree with the Court of Appeals conclusion that referring to jewelry as
 28 personal property and the names of the alleged victims as another do not qualify as
 29 judicial comment. The pattern jury instruction for the offense of robbery expressly
 30 permit the court to instruct the jury that a particular item qualifies as property if it
 31 would be appropriate within the context of the case. WPIC 2.21, at 53. Here,
 32 because there was no dispute as to whether jewelry was personal property and the
 33 only question related to whether jewelry was taken from the victims, it was not
 34 inappropriate for the court to instruct the jury that jewelry is personal property.

35 Similarly, the victim's name is not an element of the offense of robbery.
 36 Therefore, it would not constitute a comment on the evidence for the court to name
 37 the alleged victim in a jury instruction. Further, we agree with the Court of Appeals
 38 that naming the victim does not improperly suggest to the jury that it need not find

01 that the property was taken from another.

02 We hold that the “to-wit” reference to the building and the crowbar qualified
03 as judicial comments and the remaining references did not.

04 3. *How should the effect of a judicial comment be analyzed?*

05 Because we have concluded that some of the references in the jury instructions
06 qualified as judicial comments on the evidence, we must analyze their effect. Levy
07 argues that judicial comments are either prejudicial *per se* under article IV, section 16,
08 or structural errors subject to automatic reversal under *Neder v. United States*, 527
09 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

10 Article IV, section 16 states that “[j]udges shall not charge juries with respect
11 to matters of fact, nor comment thereon, but shall declare the law.” Washington
12 courts apply a two-step analysis when deciding whether reversal is required as a result
13 of an impermissible judicial comment on the evidence in violation of article IV, section
14 16. Judicial comments are presumed to be prejudicial, and the burden is on the State
15 to show that the defendant was not prejudiced, unless the record affirmatively shows
16 that no prejudice could have resulted. *State v. Lane*, 125 Wn.2d 825, 838-39, 889
17 P.2d 929 (1995); *Lampshire*, 74 Wn.2d at 892; *State v. Stephens*, 7 Wn. App. 569,
18 573, 500 P.2d 1262 (1972), *aff’d in part, rev’d in part*, 83 Wn.2d 485, 519 P.2d 249
19 (1974) (the State has the burden of showing that the jury’s decision was not
20 influenced, *even when the evidence is undisputed or overwhelming*); *Bogner*, 62
21 Wn.2d at 251, 254 (burden is not on the defendant to show prejudice; reversible error
22 unless the record affirmatively shows that the defendant could not have been
prejudiced by the error; citing cases, including *State v. Amundsen*, 37 Wn.2d 356, 223
P.2d 1067 (1950), where the court held that the burden was on the State to show no
prejudice actually resulted); *In re Detention of R. W.*, 98 Wn. App. 140, 144, 988 P.2d
1034 (1999); *see State v. Manderville*, 37 Wash. 365, 371, 79 P. 977 (1905).

23 The presumption of prejudice test has consistently been applied to *oral*
24 comments made by a judge during the course of a trial. *See Bogner*, 62 Wn.2d at
25 252; *Lampshire*, 74 Wn.2d at 892. In one recent case involving a judicial comment
26 on a specific element in a *written* jury instruction we did not explicitly apply the two-
27 step presumption of prejudice analysis but found the comment to be “tantamount to
28 a directed verdict.” *Becker*, 132 Wn.2d at 65. Significantly, however, we did not
29 expressly reject the presumption of prejudice analysis in favor of a prejudicial *per se*
30 standard.³

31
32 ³ [Washington Supreme Court footnote 2] Washington courts have concluded that judicial
33 comments were harmless in at least two cases. *State v. Lane*, 125 Wn.2d 825, 840, 889 P.2d 929

01 As an alternative basis for our ruling, both parties cite for different purposes
 02 to *Neder*, 527 U.S. at 8 (holding that misstatements and omissions in jury instruction
 03 are trial-type errors subject to harmless error analysis, not structural errors subject to
 04 automatic reversal that affect the entire framework within which the trial proceeds).⁴
 05 Levy argues that judicial comments on elements are distinguishable from the trial-type
 06 errors at issue in *Neder*, such as omitted and misstated elements, and more akin to
 07 structural errors that are subject to automatic reversal. The State contends that the
 08 *Neder* harmless error test, which has been expressly adopted by this court in other
 09 criminal contexts, should also be applied to judicial comments.

10 There are qualitative differences between structural errors, trial-type errors,
 11 and judicial comments. A structural error resists harmless error review completely
 12 because it taints the entire proceedings. A trial-type error is harmless if “it appears
 13 ‘beyond a reasonable doubt that the error complained of did not contribute to the
 14 verdict obtained.’” *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S.
 15 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). A judicial comment is presumed
 16 prejudicial and is only not prejudicial if the record affirmatively shows no prejudice
 17 could have resulted.

18 With trial-type errors, the *Neder* harmless error analysis asks the court to
 19 determine whether the result could have been the same without the error, which is a
 20 different standard than the presumption of prejudice we apply in our judicial comment
 21 cases under article IV, section 16. A structural error taints the entire proceeding,
 22 whereas a judicial comment may not be prejudicial if the record affirmatively shows
 23 that no prejudice occurred. Further, judicial comments on the evidence implicate a
 24 state constitutional provision that has no parallel in the federal constitution and the

15 (1995) (a judicial comment regarding the credibility of a witness did not prejudice one of the
 16 defendants because there was *overwhelming untainted evidence* supporting his conviction); *State*
 17 *v. Holt*, 56 Wn. App. 99, 106, 783 P.2d 87 (1989) (to convict instructions that specified the
 18 material alleged to be lewd were harmless *beyond a reasonable doubt* because other instructions
 19 provided a definition of “lewd”).

20 ⁴ [Washington Supreme Court footnote 3] *Neder* cites a “very limited class of errors” that
 21 qualifies as “structural” error. 527 U.S. at 8. The list includes *Sullivan v. Louisiana*, 508 U.S.
 22 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (defective reasonable doubt jury instruction);
 23 *Vasquez v. Hillery*, 474 U.S. 254, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (racial discrimination
 24 in grand jury selection); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122
 25 (1984) (denial of self representation); *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210, 81 L. Ed.
 26 2d 31 (1984) (denial of public trial); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.
 27 2d 799 (1963) (denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749
 28 (1927) (biased judge at trial).

01 existing state standard adequately addresses the state constitutional concerns.

02 We hold that the *Neder* harmless error analysis does not apply to judicial
 03 comment claims, although it is properly applied in other criminal contexts. *See e.g.*,
State v. Brown, 147 Wn.2d 330, 340-41, 58 P.3d 889 (2002). We also conclude that
 04 judicial comments are not structural errors or prejudicial *per se*; that is, prejudicial
 05 without further analysis. We hold that a judicial comment in a jury instruction is
 06 presumed to be prejudicial, and the burden is on the State to show that the defendant
 07 was not prejudiced, unless the record affirmatively shows that no prejudice could have
 08 resulted.

09 4. *Did prejudice result in this case?*

10 Levy argues that the errors were prejudicial because absent a finding that the
 11 apartment was a building and the crowbar was a deadly weapon, the jury did not
 12 decide that all the elements of the offenses were proved.⁵ The State argues that the
 13 errors were harmless because Levy did not dispute any of those facts. The State also
 14 argues that the facts were not critical to Levy's convictions. The critical issues were
 15 whether Levy *possessed* a crowbar and whether he *entered* the building.

16 Any similarity we have noted between the instructions here and those in
 17 *Becker* ends when we consider the relative significance of the specific comments in
 18 the two cases. The question of whether White's apartment was a building was never
 19 challenged in any way by the defendant at trial; whereas in *Becker*, the issue of
 20 whether YEP was a school was highly contested and provided the basis for the entire
 21 case. We believe the proper conclusion in this case regarding the reference to the
 22 apartment as a building is that the jury could not conclude White's apartment was
 23 anything *other than* a building. With respect to the crowbar, although it is possible
 24 that the jury in this case might have erroneously concluded that it was deadly weapon,
 25 it found that Levy *did not possess* the crowbar. As a result, he could not have been
 26 prejudiced by the comment even if the jury improperly concluded that the crowbar
 27 was a deadly weapon.

28 The fundamental question underlying our analysis of judicial comments is
 29 whether the mere mention of a fact in an instruction conveys the idea that the fact has
 30 been accepted by the court as true. The instructions here named the type of personal
 31 property allegedly stolen, the specific address where the offense allegedly occurred,
 32 the specific victims involved, and the two weapons allegedly used. Even if we

21 ⁵ [Washington Supreme Court footnote 4] Although Levy's argument also referred to the
 22 revolver, the jewelry and the named victims we do not include them in our analysis here because
 23 we have concluded that those references were not judicial comment.

01 assumed that all of those facts were judicial comments, we do not believe that
 02 prejudice resulted. No one could realistically conclude that a revolver is not a deadly
 03 weapon, an apartment is not a building, a specifically named person is not someone
 04 other than the defendant, and jewelry is not personal property.

05 The Court of Appeals in *Akers* reached a similar conclusion. *State v. Akers*,
 06 88 Wn. App. 891, 898, 946 P.2d 1222 (1997), *aff'd*, 136 Wn.2d 641, 965 P.2d 1078
 07 (1998). It reasoned that a “to-wit” reference to a knife in a deadly weapon instruction
 08 did not instruct the jury that a knife is a deadly weapon where the jury is properly
 09 instructed on the definition of a deadly weapon. *Id.* Here as well, the Court of
 Appeals correctly held that no rational juror would have concluded that jewelry was
 not property, the named victims were not someone other than Levy, a revolver was
 not a deadly weapon, or an apartment located at a specific address was not a building.
 Although we criticized the Court of Appeals reasoning in *Akers*, we did not conduct
 a detailed analysis because we affirmed on other grounds. Based on the analysis set
 out above, we conclude that the jury in this case was not relieved of its duty to
 determine that all the elements of the offenses had been proved by the State.

10 Thus, we agree with the Court of Appeals that while some of the references
 11 included in the jury instructions were judicial comments on the evidence, the errors
 12 were not prejudicial. We therefore affirm the Court of Appeals.

13 (Dkt. No. 18, Ex. 12 at 7-20.)

14 Petitioner asserts in his petition that the Washington Supreme Court erred when it analyzed
 15 a structural error; *i.e.*, the erroneous jury instructions, for harmlessness. This assertion is simply
 16 incorrect. While the Washington Court of Appeals analyzed the allegedly erroneous jury
 17 instructions for harmlessness, the Washington Supreme Court clearly did not. The Supreme Court
 18 discussed at length how the effect of a judicial comment should be analyzed. In the course of that
 19 discussion, the court drew a clear distinction between structural error, trial-type errors, and
 20 judicial comments. (Dkt. No. 18, Ex. 12 at 16-17.) The court concluded that harmless error
 21 analysis did not apply to judicial comment claims and that judicial comments are not structural
 22 errors. In fact, the Washington Supreme Court expressly stated that “[j]udicial comments on the
 evidence implicate a state constitutional provision that has no parallel in the federal constitution

01 and the existing state standard adequately addresses the state constitutional concerns.” (*Id.*, Ex.
 02 12 at 17.)

03 This statement of the Supreme Court raises an issue not touched on by the parties; *i.e.*,
 04 whether petitioner’s jury instruction claims are even cognizable in these federal habeas
 05 proceedings? It is well established that federal habeas relief does not lie for errors of state law.
 06 *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)(citing *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). And,
 07 it is not the province of federal habeas courts to re-examine state court conclusions regarding
 08 matters of state law. *Estelle v. McGuire*, 502 U.S. 62 (1991); *Jeffries v. Blodgett*, 5 F.3d 1180,
 09 1192 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994).

10 Petitioner originally presented his jury instruction claim to the state courts as one
 11 implicating only state constitutional concerns. The Washington Supreme Court, in a detailed and
 12 well-reasoned opinion, made clear that petitioner’s jury instruction claim implicated state and not
 13 federal constitutional concerns. Petitioner’s argument to the Supreme Court that the judicial
 14 comments in the jury instructions constituted structural errors under United States Supreme Court
 15 case law, did not convert the state law claim presented to it for review into a federal constitutional
 16 claim. As petitioner’s jury instruction claims involved state law issues which were resolved by the
 17 Washington Supreme Court on state law grounds, this Court concludes that petitioner’s first and
 18 second grounds for relief are not cognizable in this federal habeas proceeding. Accordingly,
 19 petitioner’s federal habeas petition should be dismissed with respect to petitioner’s first two
 20 grounds for relief.

21 Ground Three: Right to Present a Defense

22 Petitioner asserts in his third ground for federal habeas relief that he was denied his right

01 to present a defense by way of the state's misconduct. This claim arises out of the decision of
02 petitioner's co-defendant, Breena Martin, to assert her Fifth Amendment privilege and the fact that
03 the privilege was asserted by Martin's attorney rather than by Martin herself.

04 Respondent, in his answer to the petition, acknowledges that petitioner presented to the
05 Washington Supreme Court a claim that his constitutional rights were violated when Martin's
06 attorney asserted his client's Fifth Amendment right not to testify. Respondent contends,
07 however, that petitioner did not present to the Washington Supreme Court the precise claim
08 presented here; *i.e.*, that the state's misconduct caused Martin not to testify.

09 A review of petitioner's petition for review to the Washington Supreme Court (Dkt. No.
10 18, Ex. 9) fails to reveal any claim that Martin's refusal to testify was attributable to some form
11 of state misconduct. The only claim presented to the Supreme Court regarding Martin's assertion
12 of her Fifth Amendment privilege was the claim that petitioner's Sixth Amendment right to compel
13 witnesses was violated when Martin's attorney was permitted to assert the privilege. This claim
14 implicated the actions of the trial court and not the conduct of the prosecutor. Thus, to the extent
15 petitioner asserts that some form of prosecutorial misconduct caused Martin not to testify, thereby
16 violating petitioner's constitutional rights, petitioner's claim must be deemed unexhausted and, for
17 the reasons identified above, procedurally barred. The Court therefore will not consider the merits
18 of that claim. The Court will, however, consider the merits of the Sixth Amendment claim which
19 petitioner did present to the Supreme Court for review.

20 The Washington Court of Appeals, on direct appeal, rejected petitioner's claim that it was
21 improper for Breena Martin's attorney to assert his client's Fifth Amendment rights on her behalf.
22 (Dkt. No. 18, Ex. 6 at 15-16.) The Court noted that Martin was Levy's co-defendant and

01 therefore was clearly entitled to claim the privilege. (*Id.*, Ex. 6 at 15.) The Court further noted
02 that the primary case relied upon by petitioner to support his claim, *United States v. Goodwin*, 625
03 F.2d 693 (1980), “[did] not hold that the defendant must personally be brought before the court
04 to raise the claim of privilege, or that an attorney may not raise the claim on behalf of his or her
05 client in the absence of an objection.” (*Id.*, Ex. 6 at 16.)

06 The Washington Supreme Court, in contrast, concluded that the trial court erred in not
07 requiring Martin to assert her Fifth Amendment privilege. (*Id.*, Ex. 12 at 27.) The Supreme Court
08 also concluded, however, that any error was harmless “because there was such clear evidence
09 presented as to Levy’s participation in the crime.” (*Id.*)

10 Much of petitioner’s argument in these proceedings appears to focus on whether he should
11 have been allowed to question Martin about any threats or promises made to her which affected
12 her decision to assert her Fifth Amendment rights. However, the Washington Supreme Court
13 essentially resolved that issue in petitioner’s favor when it concluded that the trial court erred in
14 not requiring Martin to assert her Fifth Amendment privilege. The question, then, is whether the
15 Supreme Court reasonably concluded that the error was harmless.

16 Petitioner submitted to this Court, in conjunction with his traverse, letters which were
17 apparently written by petitioner’s co-defendants to petitioner while all were in jail. Petitioner
18 suggests that these letters, together with a statement made by Martin to the police, which
19 petitioner has been unable to obtain, demonstrate that Martin was threatened into not testifying
20 at trial. Petitioner further suggests that if he could make that showing, he could establish
21 prosecutorial misconduct so serious that he would be entitled to automatic reversal. However,
22 as noted above, the issue of prosecutorial misconduct is not before the Court in these proceedings

01 and, thus, discovery or further fact finding related to any such claim is unnecessary. Nothing in
02 the materials presented by petitioner establishes that he suffered any harm as a result of the trial
03 court's failure to require Martin to assert her Fifth Amendment privilege. Accordingly,
04 petitioner's federal habeas petition should be denied with respect to his third ground for relief.

05 Ground Six: Confrontation Clause

06 Petitioner asserts in his sixth ground for federal habeas relief that his constitutional right
07 to confront witnesses was violated when a consent to search form was offered into evidence at a
08 pretrial suppression hearing, despite a challenge to the identity of the individual who signed the
09 consent to search form. Petitioner argues that the circumstances presented here violate the rule
10 announced in *Crawford v. Washington*, 541 U.S. 36 (2004).

11 At issue is a consent to search form which was signed by John Cox, the owner of a vehicle
12 in which petitioner was known to have been riding and in which a gun was found by police during
13 their search of the vehicle. Petitioner moved to suppress the gun evidence prior to trial. At the
14 suppression hearing, the only testimony offered was that of Everett Police Officer Jeanne Innes
15 who obtained the consent to search from Cox. (Dkt. No. 18, Ex. 37, Vol. 2 at 29-36.) The state
16 also offered into evidence the written consent to search form. (*Id.* at 33.) Petitioner's counsel
17 argued that the gun found during the search of the vehicle should be excluded because the state
18 had not met its burden of establishing that there was consent to search the vehicle. (*Id.* at 37-38.)
19 Counsel argued that something more than just the officer's testimony was required to establish that
20 it was, in fact, John Cox who gave consent to search the vehicle and that no corroborating
21 evidence had been offered. (*Id.* at 37-38.) The trial court rejected these arguments and found the
22 search was consensual. (*Id.* at 40.) Petitioner now appears to argue that the trial court's

01 admission of the consent form, or acceptance of the consent form as evidence that John Cox had,
 02 in fact, consented to the search, violated his rights under the Confrontation Clause and, more
 03 specifically, *Crawford*.

04 The Confrontation Clause of the Sixth Amendment provides that “[i]n all criminal
 05 prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against
 06 him.” U.S. Const. Amend. VI.. In *Crawford, supra*, the Supreme Court held that out-of-court
 07 statements by witnesses that are testimonial in nature are barred under the Confrontation Clause
 08 unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the
 09 declarant. *Crawford*, 541 U.S. at 68-69.

10 The Washington Supreme Court briefly addressed petitioner’s *Crawford* claim in its ruling
 11 dismissing petitioner’s third personal restraint petition:

12 Mr. Levy argues that the State failed to adequately prove consent to the
 13 search of a vehicle in which a gun was found because it did not produce the vehicle’s
 14 owner at the suppression hearing (the State presented a consent form signed by the
 15 owner and the testimony of the police officer who obtained the consent). But this
 16 court rejected a similar argument on direct appeal. *Levy*, 156 Wn.2d at 728, 733. To
 17 justify raising this issue again, Mr. Levy cites as a “significant change in the law” the
 18 Supreme Court’s decision in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354,
 158 L. Ed. 2d 177 (2004), concerning the right of confrontation. But Mr. Levy cites
 19 no authority suggesting that the right of confrontation applies to suppression hearings.
 20 Nor does he show he was prejudiced by any potential denial of his right of
 21 confrontation. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005) (violation
 22 of right of confrontation subject to harmless error analysis).

19 (Dkt. No. 18, Ex. 34 at 1-2.)

20 Petitioner makes no showing that this decision of the Washington Supreme Court was
 21 contrary to, or constituted an unreasonable application of, federal law as determined by the United
 22 States Supreme Court. Petitioner cites to no authority in either his petition or his traverse which

01 suggests that the right of confrontation applies at suppression hearings. And, in fact, the United
 02 States Supreme Court has indicated otherwise. In *United States v. Matlock*, 415 U.S. 164 (1974),
 03 the Supreme Court, in considering a question regarding the admissibility of hearsay evidence at
 04 a suppression hearing, noted that “the rules of evidence normally applicable in criminal trials do
 05 not operate with full force at hearings before the judge to determine the admissibility of evidence.”
 06 The Court went on to conclude that there should be no automatic rule against the reception of
 07 hearsay evidence in pretrial suppression hearings. *Id.* at 175. In reaching this conclusion, the
 08 Court noted that “there is . . . much to be said for the proposition that in proceedings where the
 09 judge himself is considering the admissibility of evidence, the exclusionary rules, aside from rules
 10 of privilege, should not be applicable; and the judge should receive the evidence and give it such
 11 weight as his judgment and experience counsel.” *Id.*

12 Petitioner fails to establish that he suffered any violation of the rule announced in
 13 *Crawford*. Accordingly, petitioner’s sixth ground for federal habeas relief should be denied.

14 Ground Seven: Denial of Right to Appeal

15 Petitioner asserts in his seventh ground for federal habeas relief that he was denied his right
 16 to appeal. Specifically, petitioner contends that certain transcripts were missing from the record
 17 before the Court of Appeals and, as a result, the Court of Appeals did not consider several of
 18 petitioner’s *pro se* claims. Petitioner further contends that after providing the Supreme Court with
 19 copies of the missing transcripts, the Supreme Court essentially denied him the opportunity to have
 20 those previously unconsidered claims reviewed.

21 This claim is utterly without merit. In his petition for review to the Washington Supreme
 22 Court, petitioner asserted that the Court of Appeals was not provided with a record of sufficient

01 completeness and therefore was unable to analyze several of petitioner's *pro se* claims. (See Dkt.
02 No. 18, Ex. 9 at 3-4.) Petitioner identified five claims which he believed had not been considered
03 as a result of a court reporter's failure to supply the Court of Appeals with the entire transcript.
04 (*Id.*) Petitioner requested that his case be remanded to the Court of Appeals to allow it to address
05 petitioner's *pro se* claims in light of the full record. (*Id.*) Petitioner requested in the alternative
06 that the Supreme Court address the claims after providing petitioner an opportunity to brief the
07 claims. (*Id.*)

08 While petitioner apparently did not have an opportunity to submit further briefing on his
09 *pro se* claims to the Supreme Court, the record suggests that this was a decision attributable to
10 petitioner's counsel and not to the court itself. More significantly, the Supreme Court did, in fact,
11 address each of the claims petitioner identified in his petition for review as not having been
12 analyzed by the Court of Appeals. Petitioner suggests that the Supreme Court's review of those
13 claims was somehow inadequate because petitioner did not have an opportunity to more fully brief
14 the claims. However, it appears that the Supreme Court conducted a thorough and thoughtful
15 review of the claims. Petitioner offers nothing in these proceedings to suggest that additional
16 briefing would have altered the conclusion of the Supreme Court. Accordingly, petitioner's
17 federal habeas petition should be denied with respect to petitioner's seventh ground for relief.

18 CONCLUSION

19 For the reasons set forth above, this Court recommends that petitioner's federal habeas
20 petition be denied and that the petition and this action be dismissed with prejudice. A proposed
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01 order accompanies this Report and Recommendation.

02 DATED this 12th day of July, 2007.

03 
04 Mary Alice Theiler
05 United States Magistrate Judge

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